

BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

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| ERIN ROVA |) | |
| Claimant |) | |
| V. |) | |
| |) | Docket No. 1,076,405 |
| TRUST HOMECARE, LLC |) | |
| Respondent |) | |
| AND |) | |
| |) | |
| ZURICH AMERICAN INSURANCE CO. |) | |
| Insurance Carrier |) | |

ORDER

Respondent and its insurance carrier (respondent) requests review of the April 1, 2016, preliminary hearing Order entered by Administrative Law Judge (ALJ) Ali N. Marchant.

APPEARANCES

R. Todd King, of Wichita, Kansas, appeared for the claimant. Christopher J. McCurdy, of Overland Park, Kansas, appeared for respondent.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from March 29, 2016, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ found claimant met with personal injury by accident arising out of and in the course of her employment on July 21, 2015, but referred claimant to Dr. Peter Bieri for an independent medical examination (IME) to reconcile conflicting evidence regarding whether claimant's July 21, 2015, work accident was the prevailing factor causing claimant's injuries, medical condition and need for medical treatment.

Respondent appeals, arguing claimant has not met her burden of proving she met with personal injury by accident arising out of and in the course of her employment.

Respondent also contends claimant suffered a personal intervening injury, which is the prevailing factor leading to her current injuries, medical condition and need for medical treatment. Respondent requests the ALJ's Order be reversed.

Claimant argues the ALJ's Order should be affirmed.

The issue to be considered by the Board on appeal is whether claimant met with personal injury arising out of and in the course of her employment.

FINDINGS OF FACT

Claimant worked for respondent as a CNA. On July 21, 2015, claimant had been working for respondent for six months, when she sustained injury to her left foot while assisting a patient. Claimant testified the patient she was assisting was paralyzed from the waist down and she and another CNA were helping the patient stand with a walker. Claimant testified she placed her foot in front of the patient to keep his foot from sliding and she felt a pop or something in her foot, with immediate pain. Claimant indicated that placing a foot in front of the patient's foot is a technique she had been taught.

Claimant reported her foot pain to the CNA she was working with, right after it happened. Claimant was unable to remember the name of the CNA. Claimant also notified respondent and later met with the head supervisor whose name she also could not remember. Claimant expressed an interest in wanting to see a doctor. Claimant testified she was first told that respondent wanted her to go to a doctor of their choosing and later she was told she could go to whomever she wanted and to send them the bills. Claimant later found out respondent's insurance carrier was denying her claim.

A few days after the work incident, claimant heard and felt a pop in her left foot while pushing down on the emergency brake of her car. Claimant testified she had continuous pain in her foot since the July 21, incident, contending the bone in her foot was already weak at the time it popped from pushing on the emergency brake. Claimant waited a few days before going to the emergency room because she thought the pain would go away, but it did not. Claimant went to Susan B. Allen Memorial Hospital in El Dorado on August 2, 2015 and was referred to Gerard M. Librodo, M.D., of Kansas Orthopedics. When claimant went to Susan B. Allen Memorial Hospital, she indicated no new trauma or injury to her left lower leg. The medical records fail to mention any work connection to her left foot symptoms and injuries.

Claimant testified that, at first, the ER physician told her that her foot was broken and she was placed in a cast for two weeks. Later, claimant had an x-ray and was then told her foot was okay and she just had tendinitis. Physical therapy was ordered. A left foot CT was performed on December 3, 2015, which displayed a non-acute 2nd metatarsal fracture.

Claimant had surgery on her left foot on December 31, 2015, with Dr. Morrow, involving placing a plate and some screws in her foot. Claimant indicated that workers compensation has not paid for any of these medical bills and, since she told her private insurance what happened, they have not paid and these bills are considered outstanding.

Claimant contends she did not get hurt anywhere other than work. Claimant denies any problems with her foot before July 2015. Claimant also does not believe she told any of the doctors that her foot problems were not work-related.

Claimant met with Pedro Murati, M.D., on March 8, 2016, for an examination at her attorney's request. Claimant complained of continued left foot pain; walking differently due to left foot pain; occasional difficulty sleeping due to left foot pain; increased left foot pain with all activities involving being on her feet; swelling in the left foot; and increased left foot pain when wearing certain shoes.

Dr. Murati examined claimant and noted: status post left second metatarsal fracture nonunion, left bone marrow aspirate, intraoperative fluoroscopy, left lower extremity chronic regional pain syndrome and metatarsalgia of the left 2nd, 3rd and 4th metatarsal heads. He opined these diagnoses were within all reasonable medical probability, a direct result from the work-related injury on July 21, 2015, during claimant's employment with respondent.

Dr. Murati recommended a bone scan of the affected extremity and possibly a series of sympathetic paravertebral blocks. He also recommend claimant be placed on Neurontin or Lyrica along with an anti-inflammatory, pain medication as needed, 1000 mg of Vitamin C three times a day; contrast baths to the extremity and orthotics for the 2nd, 3rd and 4th metatarsal heads for sit down work only. He opined claimant is at risk for overuse syndrome to her hips, low back and knees, secondary to antalgia.

Dr. Murati assigned temporary restrictions of: no manual driving, no repetitive foot controls with the left; no lifting, carrying, pushing or pulling more than 35 pounds, occasionally lift, carry, push, pull up to 35 pounds and frequently up to 20 pounds; rarely climb ladders, climb stairs or squat; and occasionally stand or walk.

Dr. Murati wrote the following regarding prevailing factor:

The claimant sustained a work related accident which resulted in left foot pain. She is a young person. Her hobbies are not known as a direct cause for her current diagnoses. Her smoking habit, although deleterious is not known as a direct cause for her current diagnoses. She has no significant pre-existing injuries that would be related to her current diagnoses. She has significant clinical findings that have given her diagnoses consistent with her described accident at work. Apparently, on this claimant's date of injury she sustained enough permanent structural change in the anatomy of her left foot which caused pain necessitating treatment. Therefore,

it is under all reasonable medical certainty and probability that the prevailing factor in the development of her conditions is the accident at work.¹

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2014 Supp. 44-501b(b)(c) states:

(b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2014 Supp. 44-508(f)(1)(2)(B)(3)(A) states:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

...

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

(3)(A) The words "arising out of and in the course of employment" as used in the workers compensation act shall not be construed to include:

(i) Injury which occurred as a result of the natural aging process or by the normal activities of day-to-day living;

(ii) accident or injury which arose out of a neutral risk with no particular employment or personal character;

(iii) accident or injury which arose out of a risk personal to the worker; or

(iv) accident or injury which arose either directly or indirectly from idiopathic causes.

Respondent contends claimant failed to prove the accident described on July 21, 2015, occurred. However, respondent provided no witness to contest claimant's

¹ P.H. Trans., Cl. Ex. 1 at 5.

description of the accident. It is true the medical records from the hospital do not describe the events alleged at work, but claimant testified to advising the emergency room health care providers of the work incident. Claimant also described to Dr. Murati the incident with the patient at work.

The ALJ had the opportunity to observe claimant testify, finding her credible in describing the alleged work accident. This Board Member concurs with the findings of the ALJ. Claimant has proven that she suffered an accident on July 21, 2015, while helping a patient. Therefore, claimant has proven she suffered personal injury by accident which arose out of and in the course of her employment with respondent.

How claimant's work injuries were impacted by the personal injury suffered while pushing on the emergency brake in her car has not been addressed by the ALJ. The Order of the ALJ assigned to Dr. Bieri the task of determining claimant's current injuries and need for medical treatment, and how the original accident impacts those issues. Dr. Bieri was instructed to determine claimant's diagnosis and treatment recommendations. He was also instructed to determine whether claimant's work accident is the prevailing or primary factor causing claimant's current injury, medical condition and resulting disability or impairment. In ordering the parties to provide Dr. Bieri with "all available medical records", the ALJ apparently intends that Dr. Bieri consider the non-work-related incident while claimant was driving her car as well. Those significant questions remain unanswered.

The ALJ expressly ordered the parties to return to her court room for a follow-up hearing upon receipt of Dr. Bieri's report for "final resolution of all outstanding issues." As no determination has been made by the ALJ, those undecided issues will not be addressed by this Board Member at this time.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2014 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed in that claimant has satisfied her burden of proving she suffered personal injury by accident which arose out of and in the course of her employment with respondent on July 21, 2015. All other issues remain undetermined by the ALJ and will not be addressed by the Board at this time.

² K.S.A. 2014 Supp. 44-534a.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Ali N. Marchant dated April 1, 2016, is affirmed in that claimant has proven accidental injury arising out of and in the course of her employment with respondent on July 21, 2015.

IT IS SO ORDERED.

Dated this _____ day of May, 2016.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Ali N. Marchant, Administrative Law Judge